Marquette Law Review

Volume 58
Issue 2 *1975 (Number 2)*

Article 6

1975

Domestic Relations

John W. Knuteson

thus consistent with frequent statements that a revocation proceeding is not part of the criminal process.[100]

RUSSELL C. BRANNEN, JR.

DOMESTIC RELATIONS

The cases decided on the subject of domestic relations in the August, 1973 Term of the Wisconsin Supreme Court fall generally into the areas of the adoption and custody of children, and property division and settlement agreements.

I. THE ADOPTION AND CUSTODY OF CHILDREN

The *Adoption of Tachick*[1] was the most significant decision dealing with the adoption and custody of children, because it was the first Wisconsin case to define "the best interests of the child."[2] In this case petitioners sought to adopt an illegitimate grandson who had been born to their son and a fifteen year old girl who had been living in their home. A number of months after giving birth, the mother of the child returned to her own family, leaving the child with the petitioners. Approximately two years after the child's birth, the county department of social services held a hearing, at which the rights of both parents were terminated. The child

ex rel. Hanson v. H & SS Dept., 64 Wis. 2d 367, 379, 219 N.W.2d 267, 274 (1974). Wis. Laws 1973, ch. 217 creates § 261.01(9m) and changes § 253.11(1) to provide concurrent jurisdiction.

100. State ex rel. Hanson v. H & SS Dept., 64 Wis. 2d at 379, 219 N.W.2d at 274; State ex rel. R.R. v. Schmidt, 63 Wis. 2d at 90, 216 N.W.2d at 21.

1. 60 Wis. 2d 540, 210 N.W.2d 865 (1973).

2. *Id.* at 543, 210 N.W.2d at 867. In State ex rel. Lewis v. Lutheran Social Services, 59 Wis. 2d 1,9, 207 N.W.2d 826, 831 (1973), the court stated:

> The phrase, "best interests of the child," means all things to all people: it means one thing to a juvenile judge, another thing to adoptive parents, something else to natural parents, and still something different to disinterested observers. If judges were endowed with omniscience, the problem would not be difficult; but the tendency in man is to apply intuition in deciding that a child would be "better" with one set of parents than with another, and then to express this intuitive feeling in terms of the legal standard of being "in the best interests of the child." Courts have not laid down any definite guidelines which can be followed in every case to insure protection of what the average person means by "best interests." . . . The "best-interests-of-the-child" test does not speak in terms of the present, the immediate future, or even the ultimate future of the child.

remained in the grandparents' home pending the outcome of their petition to adopt the child; the mother supported the grandparents' petition. Largely due to objections by the state and county departments of health and social services, as well as by the guardian ad litem, the trial court found adoption by the grandparents not to be in the best interests of the child and denied the grandparents' petition.

On appeal the court considered, as a question of law,[3] whether the proposed adoption by the grandparents would indeed be in the best interests of the child. First, the court discussed the history and effect of a recommendation by a guardian ad litem in adoption proceedings,[4] and noted:

> . . . [A] progressive retraction of authority from the guardian in adoption proceedings and under the present law a trial court may determine the best interests of the child as an original proposition in an adoption proceeding; and where the adoption is not recommended by the guardian of the child, *the presumption of the recommendation may be overcome by a fair preponderance of credible evidence.*[5] (Emphasis added)

The court examined the factors considered in the trial court denial of the grandparents' petition for adoption, and established as the test of the best interests of the child in this fact situation:

> . . . [T]he sole issue is whether grandparents can provide food, shelter, clothing, love and affection, education and training which will aid the child to develop to his full potential as a human being.[6]

The trial court deemed several factors to be controlling. The grandparents would be unable to protect the child from interference by the natural parents, and the child's father would legally become his brother. Also, the grandparents were unsuitable because of their age, their health, and the educational[7] and disciplinary history of their own eight children. It was further argued on appeal that psychological damage could result to the child from the

3. 60 Wis. 2d at 548, 210 N.W.2d at 869; contrary language in Adoption of Jackson, 201 Wis. 642, 231 N.W. 158 (1930), which deemed this to be a question of fact was withdrawn.

4. 60 Wis. 2d at 544-546, 210 N.W.2d at 867-868.

5. *Id.* at 546, 210 N.W.2d at 868; WIS. STAT. § 48.85(2) (1971).

6. *Id.* at 548, 210 N.W.2d at 869.

7. *Id.* at 550, 210 N.W.2d at 870. The court said that the best interents of the child today require at least a high school education or its equivalent.

"bastard stigma," rejection by his natural parents, and possible future "death trauma."

However, the court found these factors unpersuasive and reversed the trial court. In granting the grandparents' petition for adoption, the court noted that no one factor is determinative of the best interests of the child, but each must be weighted in light of the facts.[8] The court emphasized, however:[9]

(1) the petitioners were the grandparents of the child, with natural love and affection for him;

(2) the petitioners have taken care of the child since birth, and there would be "separation trauma" if the child were taken from these "psychological parents;"

(3) the wishes of the child's mother in support of the grandparents' petition.

Therefore, the general test of the best interests of the child may be expanded to require a determination of whether the petitioners for adoption:

> . . . [C]an provide food, shelter, clothing, love and affection, education and training which will aid the child to develop to his full potential as a human being.[10]

The practical assistance which this new definition provides is uncertain, due to the very general nature of the factors to be considered.

Pfeifer v. Pfeifer[11] discussed other factors to be considered in determining whether a custody award is in the best interests of the child. In the *Pfeifer* case, the plaintiff/wife brought an action for divorce. The defendant/husband in his answer sought custody of the parties' five children. Although the court ordered temporary custody to the mother, at trial the custody of the children was awarded to the father. Plaintiff appealed the custody portion of the judgment of absolute divorce.

The Wisconsin Supreme Court affirmed the trial court decision, finding no abuse of discretion in granting custody to the father. In reaching its decision, the trial court considered evidence concerning the plaintiff's adulterous relationship with an eighteen year old boyfriend, and her emotional instability. The trial court refused to make the mother's temporary award of custody of the

8. *Id.* at 549, 210 N.W.2d at 870.
9. *Id.* at 555-556, 210 N.W.2d at 873.
10. *Id.* at 548, 210 N.W.2d at 869.
11. 62 Wis. 2d 417, 215 N.W.2d 419 (1974).

children more than one factor to be considered,[12] and expressed its belief that the transfer of custody to the father would cause the children no "emotional or psychological disturbances."[13] The supreme court held that these factors justified the conclusion that granting custory to the mother would not be in the best interests of the children. The trial court's failure to order a social service investigation (which is not mandatory)[14] and to appoint a guardian ad litem[15] was not reversible error.

The question in *Kurz v. Kurz*[16] arose out of a post-trial motion for modification of the custody award. Here the trial court, in granting a divorce judgment, found both parents unfit to have custody of their child. Custody was awarded to the paternal grandparents as being in the best interests of the child. At the time of the divorce decree the mother was found unfit to have custody (due to acts of adultery, evidence of a suicidal tendency, and the need for psychiatric treatment). However, approximately one year later she sought a change of custody due to her improved condition. On appeal, the denial of the mother's motion by the trial court was upheld by the Wisconsin Supreme Court. The court found that custody of a child was not to be given to a parent "as a reward for good conduct,"[17] but required:

> . . . (1) a showing that the divorced parent is a fit and proper person to have custody and able to adequately care for the child; and (2) a showing that the best interests of the child would be served by the proposed change or modification of the custody award.[18]

Since the mother failed to meet this burden of proof, the order denying transfer of custody to the mother was properly affirmed.

---

12. *Id.* at 426, 215 N.W.2d at 424. Due to the lack of full inquiry by a court in awarding temporary custody, such an order should not be deemed determinative.

13. *Id.* at 427, 215 N.W.2d at 424.

14. *Id.* at 427-428, 215 N.W.2d at 424.

15. *Id.* 430-431, 215 N.W.2d at 426. It should be noted that three members of the court would have found an abuse of discretion in the failure of the trial court to appoint a guardian ad litem when it became clear during the trial that there would be a dispute as to custody of the children.

16. 62 Wis. 2d 677, 215 N.W.2d 555 (1974).

17. *Id.* at 683, 215 N.W.2d at 558, citing Dees v. Dees, 41 Wis. 2d 435, 164 N.W.2d 282 (1969); *see also* WIS. STAT. § 247.24(2) (1971).

18. 62 Wis. 2d at 686-687, 215 N.W.2d at 560. The burden of proof which applies in awarding custody in divorce cases differs from that used where a surviving parent seeks custody after a spouse has died under the rule in Ponsford v. Crute, 56 Wis. 2d 407, 202 N.W.2d 5 (1972).

II. PROPERTY DIVISION AND SETTLEMENT AGREEMENTS

Several cases in the term dealt with property division and settlement agreements in divorce proceedings. In *Lacey v. Lacey*[19] the plaintiff/wife obtained an absolute judgment of divorce in 1969, and was granted custody of the parties' one child with child support set at $60 per month. In lieu of alimony, the trial court made a division of the property of the parties in an amended judgment,[20] from which the defendant/husband appeals. The Wisconsin Supreme Court first determined the value of real property owned by the wife before marriage, and deemed this to be her separate estate. Next, the court discussed the effect of capital contributions from "pooled funds." A division of the marital estate was calculated.[21] However, such calculations are no longer required, due to the amendment of the statute controlling alimony and property division, Wisconsin Statute section 247.26.[22]

Finally, the court considered the division of property by the trial court and agreed that 50 per cent to each party was a fair and reasonable division of the marital estate. The equal division was not an abuse of discretion, especially since the division was in lieu of alimony.[23] While the court expressed concern that the trial court failed to set forth the factors upon which it made its determination, as was requested in the remand in the first *Lacey* decision,[24] the court did not remand for further proceedings due to the desire of the parties for a final determination. The judgment as modified was affirmed by the court.

In *Vier v. Vier*,[25] the plaintiff/wife was granted an absolute divorce on the grounds of desertion, and the trial court granted a property settlement in lieu of alimony. The award granted defendant $10,000. On appeal, the plaintiff questioned whether the trial court abused its discretion in not expressly setting forth in its

19. 61 Wis. 2d 604, 213 N.W.2d 80 (1973).

20. The trial court judgment was amended after reversal and remand in a previous decision, Lacey v. Lacey, 45 Wis. 2d 378, 173 N.W.2d 142 (1970). This case was important because it discussed the factors involved in a proper division of the marital estate. This case also directed trial courts to indicate the factors considered and the property values determined in making a property division.

21. WIS. STAT. § 247.26 (1969).

22. WIS. STAT. § 247.26 (1971).

23. The factors affecting property division in divorce cases which the court felt were relevant and which were discussed in the decision in Lacey v. Lacey, 45 Wis. 2d 378, 383, 173 N.W.2d 142, 145, were incorporated in WIS. STAT. § 247.26 (1971).

24. *Id.* at 387, 173 N.W.2d at 147.

25. 62 Wis. 2d 636, 215 N.W.2d 432 (1974).

opinion the factors considered by the court in its property award. The court pointed out that while it had admonished trial courts to indicate the reasons for its property divisions,[26] the court would not reverse, if from the record the court can reasonably conclude that the division of property was equitable. Here the court found the award reasonable because of the defendant's contribution to the parties' resort business. However, the court stated:

> We again urge trial courts to state their reasons why certain assets are apportioned to one party and other assets are apportioned to the other party. While the general result might well be reasonable and equitable, giving one's reasons for reaching such a result will cut down reversals for what might look to this court like an abuse of discretion. This court should not be required to search the record for reasons to sustain a trial court. The giving of reasons by the trial court will also cut down cases where it is necessary to set aside a judgment and send the case back for further proceedings because it is impossible for this court to review the trial court's decision. This court is too busy to attempt in every case to justify the trial court's judgment with its own reasons, as it has done in this appeal.[27]

The court gave further consideration to trial court awards in division of a marital estate in the *Rosenheimer*[28] case. Upon granting an absolute divorce the trial court in *Rosenheimer* awarded the plaintiff/wife $50,000, representing 22% of the marital estate. In addition the trial court established a trust for the one child born to the parties and ordered child support payments of $325 per month. The defendant/husband appealed from this judgment.

The supreme court found that the $50,000 award to the plaintiff was reasonable in light of the defendant's real estate and business assets. The court looked to the factors discussed in Wisconsin Statute section 247.26 in dividing the estate, giving:

> . . . [D]ue regard to the legal and equitable rights of each party, the length of the marriage, the age and health of the parties, the liability of either party for debts or support of children, their respective abilities and estates, whether the property award is in lieu of or in addition to alimony, the character and situation of the parties and all the circumstances of the case. . . .[29]

26. 45 Wis. 2d at 387, 173 N.W.2d at 147; Husting v. Husting, 54 Wis. 2d 87, 91, 194 N.W.2d 801, 803 (1972).

27. 62 Wis. 2d at 642, 215 N.W.2d at 435.

28. Rosenheimer v. Rosenheimer, 63 Wis. 2d 1, 216 N.W.2d 25 (1974).

29. WIS. STAT. § 247.26 (1971).

While the court found the amount of the award to be appropriate, it found the requirement that payment be made within 45 days unreasonable. This was because the husband would have been required to sell or encumber his home or business, both of which were required to support the children from an earlier marriage. The court suggested an alternate method of payment.[30]

After considering statutes[31] which permit the establishment of trusts for education and support, the court struck from the judgment of the trial court the trust set up for the parties' one child. This was due to the lack of evidence that the father would not provide for the education of the child on the same basis as that provided to his children from another marriage. The court also objected to the trust's improper provision for benefits subsequent to the child reaching majority. The court revised the support payments ordered by the trial court to $250 per month, contending that $325 per month was excessive in light of the mother's earning capacity and other factors.

In *Tesch v. Tesch*,[32] the defendant/husband, upon his counterclaim, was granted a divorce pursuant to a jury finding of adultery on the part of the plaintiff/wife. While no alimony could be awarded,[33] the trial court awarded the wife approximately 38.3 per cent of the net marital estate. The defendant on appeal questioned this property distribution.

The court emphasized the *Lacey*[34] case in finding no abuse of discretion in the award of property to the wife. After determining the net estate, the trial court relied on the "rule" that one-third was an appropriate award to a wife, in the absence of extraordinary circumstances. The court stressed the rejection of any such formula under the *Lacey*[35] decision. However, the trial court did list the factors which it felt made the property division equitable. Although the trial court had not considered all the factors listed in *Lacey*,[36] the court did not feel "the missing factors mentioned by the defendant would necessitate a shift in the division of the estate."[37] The

30. 63 Wis. 2d at 11, 216 N.W.2d at 29.

31. WIS. STAT. § 247.30 (1971); WIS. STAT. § 247.31 (1971).

32. 63 Wis. 2d 320, 217 N.W.2d 647 (1974).

33. WIS. STAT. § 247.26 (1971), which provides in part: " . . . no alimony shall be granted to a party guilty of adultery not condoned. . . ."

34. 45 Wis. 2d 378, 173 N.W.2d 142 (1970).

35. *Id.* at 380-383, 173 N.W.2d at 144-145.

36. *Id.* at 383-384, 173 N.W.2d at 145.

37. 63 Wis. 2d at 329, 217 N.W.2d at 651.

court noted that it "understood the feelings" of the husband about the property division in light of his wife's adulterous conduct, but it did not conclude that the trial court abused its discretion in so dividing their marital estate.[38]

The court also considered the determination of attorney's fees for the wife and contribution to them by the husband. While there is no required method for determining the amount of attorney fees, the court said:

> We deem it the better practice to have each attorney present evidence on his fees at the time testimony is taken on the value of assets and the amount of liabilities affecting the marital estate, or if a bill is submitted to the court, that a copy be submitted to opposing counsel so that comments may be made thereon.[39]

This procedure provides a hearing and therefore meets the requirements of due process of the law as to the amount of attorney fees. The contribution of the husband to these fees is based on the need of the wife and the husband's ability to pay.[40] Once again, no abuse of discretion was found in requiring the defendant/husband to contribute $2,000 of a $2,500 bill to the plaintiff's attorney fees. However, because both parents are concerned with protecting the interests of the children in a divorce, the court did require the plaintiff to pay 50 per cent of the guardian ad litem fee.

Finally, a brief discussion of the decision in *Slawek v. Stroh*[41] is warranted, because the case dealt with the rights of putative fathers to assert their parenthood. It also discussed the public policy considerations involved in a cause of action for "wrongful birth."

In the *Slawek* case, the plaintiff sought a declaratory judgment to establish his parentage of an illegitimate child, and to define his rights and duties with respect to custody, care, visitation and support of the child. The mother asserted affirmative defenses and counterclaimed on the basis of fraud (which resulted in allegations of assault and battery, breach of promise, and seduction), and invasion of privacy. The child by a guardian ad litem counterclaimed on a theory of "wrongful birth," seeking damages for the

38. *Id.* at 332, 217 N.W.2d at 653.

39. *Id.* at 334, 217 N.W.2d at 654.

40. Hirth v. Hirth, 48 Wis. 2d 491, 493-496, 180 N.W.2d 601, 602-604 (1970).

41. 62 Wis. 2d 295, 215 N.W.2d 9 (1974). For a more complete discussion of the issues in this case, *see* 58 MARQ. L. REV. 175 (1974), "The Constitutional Rights of a Putative Father to Establish his Parentage and Assert Parental Rights."

publicizing of her illegitimate status. After resolving numerous procedural questions, the court ruled that:

(1) A putative father has the constitutional right[42] to establish his status as the parent of an illegitimate child, and therefore has some parental rights and duties which may be determined by means of a declaratory judgment.[43]

(2) While the mother has no cause of action for breach of promise to marry in Wisconsin,[44] she does have a cause of action for seduction.[45]

(3) While generally Wisconsin does not recognize a cause of action for invasion of privacy, the exception for an intentional causing of emotional distress permits the cause of action as pleaded in this case.[46]

(4) Due to public policy and possible social ramifications, an illegitimate child has no cause of action against her natural father for "wrongful birth."[47]

The complex substantive and procedural questions involved in this case were remanded for further proceedings.

JOHN W. KNUTESON

REAL PROPERTY

I. LANDLORD AND TENANT

In the 1973 term the Wisconsin Supreme Court decided two cases involving the law of landlord and tenant, concerning the landlord's right to receive rent. In *State ex rel. Building Owners & Managers Association of Milwaukee, Inc. v. Adamany*,[1] a group of property owner-landlords brought an original action in the supreme court seeking a declaratory judgment on the constitution-

42. The court relied upon two recent cases, Stanley v. Illinois, 405 U.S. 645 (1972); State ex rel. Lewis v. Lutheran Social Services, 59 Wis. 2d 1, 207 N.W.2d 826 (1973).

43. WIS. STAT. § 269.56 (1971); 62 Wis. 2d at 305-307, 215 N.W.2d at 15-16.

44. WIS. STAT. § 248.01 and § 248.02 (1971).

45. 62 Wis. 2d at 310-312, 215 N.W.2d at 18-19; 43 MARQ. L. REV. 341, 356 (1960).

46. *Id.* at 315, 215 N.W.2d at 20, citing Alsteen v. Gehl, 21 Wis. 2d 349, 124 N.W.2d 312 (1963).

47. 62 Wis. 2d at 316-318, 215 N.W.2d at 21-22.

1. 64 Wis. 2d 280, 219 N.W.2d 274 (1974).